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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HOME DEPOT, U.S.A., INC.,
Petitioner,
v.
VICKI BUTLER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. The written consents of all parties have been filed with the Clerk of this Court. The brief supports the petition for writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

EEAC is a voluntary association of employers organized to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several associations which themselves have hun-

dreds of corporate members. EEAC has a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, as well as other employment laws and regulations. As large employers, they represent likely targets for the sort of broad-based class action suits at issue in this case. Thus, EEAC has an interest in the procedures under which Title VII class action cases are litigated.

In the instant case, in which class-based claims of both disparate impact and disparate treatment have been raised in connection with alleged sex discrimination in hiring and promotion, the Ninth Circuit left intact a class certification and related bifurcation order that is fundamentally unworkable and violates the defendant employer's rights under the Seventh Amendment to the United States Constitution. In particular, the District Court directed that the litigation be divided into two stages—a liability stage and a damages stage. A "common issues" jury is to determine liability and punitive damages, and one or more "follow-up" juries then will determine other damages for individuals.

If this order stands, the initial liability phase of the litigation will be unworkable, because liability for disparate treatment on claims such as those presented here, and for punitive damages, cannot be determined solely on the basis of "common issues." Furthermore, the "follow-up" juries, inevitably, will have to con-

sider issues already decided by the initial jury. EEAC members are concerned that employers' constitutional rights are being trammeled in these sorts of proceedings. Moreover, this approach to employment discrimination litigation creates undue and unfair pressure on employers to settle cases, regardless of their merit.

The issues presented in the petition, therefore, are extremely important to the nationwide employer constituency that EEAC represents. Because of its interest in such issues, EEAC has filed *amicus curiae* briefs in a number of other cases involving class actions under Title VII and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (ADEA). *E.g., K-Mart Corp. v. Helton, cert. denied,* —— U.S. ——, 136 L.Ed.2d 342 (1996) (use of ADEA representative action to challenge corporate downsizing involving numerous locations); *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996) (same case); *Hoffmann-La Roche Inc. v. Sperling*, 493 U..S 165 (1989) (scope of federal court's discretion to facilitate notice to potential plaintiffs in representative class actions under ADEA); *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) (proper class representative under Title VII).

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

This brief is timely as it is being filed within the time allowed in Supreme Court Rule 37.2 for filing a brief in support of the petition for writ of certiorari.

STATEMENT OF THE CASE

On December 21, 1994, Vicki Butler and several other women (hereinafter "Plaintiffs") filed a complaint in the United States District Court for the Northern District of California alleging unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the California Fair Employment & Housing Act, Cal. Gov't Code § 12900 *et seq.*, against female employees and applicants throughout Home Depot's West Coast Division. Plaintiffs allege that Home Depot discriminates on the basis of gender in nearly all aspects of employment including: (1) hiring and initial job placement; (2) training; (3) transfer opportunities to merchandising positions; (4) promotional opportunities to supervisory and management positions; and (5) compensation.

On Plaintiffs' motion, the District Court certified a gender-based class under Federal Rule of Civil Procedure 23(b)(2). The court defined the class as follows:

> A. All female employees of Home Depot within the geographical area of Home Depot's West Coast Division who are or were employed on or after November 5, 1992, or who are or will be employed between this date and the date of entry of judgment in this class action; and
>
> B. All female applicants who applied for employment in Home Depot stores within the geographical area of Home Depot's West Coast Division on or after November 5, 1992 and were qualified for employment in the positions of salespersons or assistant managers and who were not hired or were hired for cashier or other positions.

(Pet. App. at 11a-12a.) By Home Depot's calculations, that class comprises approximately 217,000 members, including roughly 17,000 employee members and 200,000 applicant members, in 10 western states.

The District Court further ordered that the litigation proceed in two phases. The initial phase is to address "liability and relief applicable to the class as a whole . . . and whether defendant is liable for punitive damages." (Pet. App. at 12a.) If discrimination is found, the parties will proceed to the next phase, where "individual compensatory and equitable relief, including entitlement to back and front pay" will be addressed. (Pet. App. at 12a.)

Home Depot asked the District Court to certify the issues relating to class certification for interlocutory appeal. After the court denied that request, Home Depot petitioned the Ninth Circuit Court of Appeals for a writ of mandamus directing the district court to vacate its order certifying the class, and to enter a new order denying class certification and dismissing the class claims. The Ninth Circuit denied the petition and rejected Home Depot's subsequent request for a rehearing *en banc*.

On December 12, 1996, Home Depot filed the instant petition for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

As a result of the Civil Rights Act of 1991, which made compensatory and punitive damages, as well as jury trials, available for the first time to plaintiffs alleging intentional discrimination under Title VII of the Civil Right Act of 1964, 42 U.S.C. § 2000e

et seq., new and important issues have emerged regarding the constitutionality and propriety of permitting such claims to proceed as class actions. A special problem arises when courts bifurcate employment discrimination class action litigation to be decided by juries into two stages: a liability stage and a damages stage, where one "common issues" jury is to sit for the first phase and one or more "follow-up" juries is to sit for the second phase. Such bifurcation schemes may appeal to courts as a means of attempting to manage large class action litigation, where there are significant common as well as individual claims to resolve. But, bifurcation is fundamentally unavailing in cases such as this one, where liability cannot be established on the disparate treatment issues without individualized consideration of thousands of separate personal transactions. Moreover, such bifurcation schemes violate the Seventh Amendment to the U.S. Constitution when they result in more than one jury assessing the same set of facts.

These problems are unavoidable in large intentional discrimination class actions, where damages are sought. Such claims inevitably raise interrelated and overlapping issues that cannot be divided neatly for separate consideration by different juries. For example, facts showing the existence of a pattern of discrimination bear on individual claims of discrimination, and vice versa. At the same time, liability to individual claimants cannot be established without particularized consideration of their qualifications and the employer's reasons for not hiring, promoting, or retaining them. Similarly, defenses raised to rebut general claims of discrimination may also pertain to individual claims of discrimination. Finally, the individual's entitlement to punitive damages depends

in large part on the type of discriminatory actions directed toward the individual and the injury suffered as a consequence. There is simply no neat way for two juries to resolve issues of liability and damages in intentional employment discrimination cases without going over many of the same facts, resulting in cumbersome duplication of efforts as well as a violation of the Constitution.

Through the improper certification and bifurcation of such suits, tremendous pressure is placed upon employer defendants to settle, regardless of the merits of the claims, rather than to bear the inherent costs and risks entailed in proceeding with such expansive and duplicative litigation. Such a result is unfair to employers and does nothing to advance the cause of equal employment opportunity.

Given the importance of the issues raised by this case and the increasing frequency with which such issues are likely to arise, Supreme Court review is appropriate.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW OF THE DECISION BELOW TO ADDRESS A GROWING TREND AMONG EMPLOYMENT DISCRIMINATION CLAIMANTS TOWARD ABUSIVE USE OF CLASS ACTION PROCEDURES

A. Since Jury Trials and Compensatory and Punitive Damages Became Available in Title VII Cases in 1991, Class Action Procedures Have Been Used Repeatedly to Deprive Employers of Constitutional Rights

With the enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.), the character of fed-

eral employment law and litigation changed dramatically. Most relevant to this case, the new law makes compensatory and punitive damages available to plaintiffs under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, whereas only equitable relief had been available before. 42 U.S.C. § 1981a(a)(1). It also provides both plaintiffs and defendants with the new right to jury trials in cases where such damages are sought. 42 U.S.C. § 1981a(c)(1).

These added remedies, however, come with limitations. To start, compensatory and punitive damages are available only in cases of intentional discrimination, *i.e.*, disparate treatment cases, not in disparate impact cases. 42 U.S.C. § 1981a(a)(1). In addition, punitive damages may be recovered only where the plaintiff demonstrates that an employer "engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved *individual*." 42 U.S.C. § 1981a(b)(1) (emphasis added). As both limitations reflect, damages are available only where a plaintiff personally has been the target of intentional discrimination. Finally, in all such instances, damages are subject to a cap of up to $300,000, depending on the size of the employer. 42 U.S.C. § 1981a(b)(3).

The highly individualized nature of damage awards is also reflected in the requirements courts impose upon plaintiffs to show proof of actual harm in order to recover compensatory damages. Indeed, absent significant corroborative evidence supporting the existence of a specific discernible injury, many courts will award no more than nominal damages. *See Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3505 (U.S. Jan. 21, 1997) (No. 96-734) (finding district court's award of $150,000 for emotional distress in a Title VII claim

an abuse of discretion, given that the only evidence plaintiff offered to support his claim was testimony about his feelings); *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir.), *cert. denied*, 117 U.S. 584 (1996) (setting aside a $500,000 jury award, finding that plaintiff's conclusory statements regarding her mental suffering, without more, were insufficient to justify her award).

By making money damages available to plaintiffs, the 1991 Civil Rights Act created additional incentives for individuals to file suit. Today's Title VII plaintiff may be out to vindicate her rights and change her workplace, or she may simply be motivated by the opportunity to receive money damages. The increase in the number of employment discrimination lawsuits filed since the Act was passed suggests that, at least in part, the money matters.[1]

Enterprising plaintiffs' attorneys, too, have been motivated by the increased opportunities the Act presents. They have been quick to recognize that the potential value of a lawsuit, in terms of damages alone, is largely a factor of the number of plaintiffs that can be brought together. While the claim of one plaintiff may be worth no more than $300,000, the claims of 20 are potentially worth $60 million, and the claims of 200,000 theoretically are worth as much as $60 billion.

Since 1991, plaintiffs' attorneys increasingly have turned to class actions as the vehicles to bring to-

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[1] In 1991, 8,140 employment discrimination cases were filed in federal courts across the country. That number increased annually to 23,152 for the twelve month period ending September 30, 1996. Administrative Office of the United States Courts, Reports of the Proceedings of the Judicial Conference of the United States (1991, 1996).

gether large groups of potential plaintiffs to seek damages. In 1991, 32 class actions alleging employment discrimination were filed in the federal courts. By the twelve month period ending in September of 1996, just under four years after the Civil Rights Act was enacted, that figure had more than doubled to reach 68, according to the Administrative Office of the United States Courts.[2]

With this new crop of post-Civil Rights Act of 1991 class actions have come new procedural issues that raise important questions of case management, as well as Seventh Amendment questions relating to employers' jury trial rights. These issues arise when courts attempt to bifurcate class action suits involving claims of intentional discrimination into two stages: a liability stage and a damages stage, where one jury is to sit for the first phase and one or more follow-up juries is to sit for the second phase. In the context of claims of intentional employment discrimination, this procedure not only fails to achieve the efficiency that is the raison d'être of class actions, but also leads inevitably to more than one jury assessing some of the same facts in a case—a violation of the Seventh Amendment.

1. ***The Use of Class Action Procedures in Cases Involving Thousands of Separate Employment Decisions Is Fundamentally Unworkable***

As touched upon above, intentional employment discrimination claims, particularly those in which compensatory and punitive damages are sought, are highly individualized in terms of the proof that is required to make them out and to defend against them. When thousands of such claims are presented

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[2] *Id.*

to a court in the form of a class action, case management concerns immediately arise.

In this case, the District Court's answer to these concerns was bifurcation. But where liability hinges on the circumstances surrounding each of thousands of separate employment transactions, bifurcation solves little. It can only result in repetitive consideration of the same issues. It can do little to expedite the liability determination, because, unless some intentionally discriminatory, across-the-board policy or practice is involved, liability for disparate treatment cannot be established without considering each individual's relative qualifications for a specific position, the employer's proffered reasons for not selecting or retaining that individual, and whether or not those reasons are pretext for discrimination.[3] *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). Thus, the liability phase of such a proceeding inevitably becomes a cumulative series of mini-trials—in this case, potentially hundreds of thousands of them.

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[3] The need for such individualized findings will also exist in Stage II of the bifurcated proceedings, where individual entitlement to damages is to be established. The necessity for repeated focus, in both stages of the bifurcated proceeding, on facts pertaining to intentional discrimination and the resulting harm experienced by individuals, raises another important question. That is, whether class certification is ever appropriate under Rule 23(b)(2) for claims of intentional employment discrimination, where compensatory and punitive damages are sought. For, in order to meet the requirements for such certification, plaintiffs must demonstrate that claims in the suit for injunctive or declaratory relief "predominate" over claims for money damages. Fed.R.Civ.P. 23(b)(2) advisory committee's notes. Under the circumstances discussed above, it is difficult to imagine when that would ever be the case.

Cf. Celestine v. Citgo Petroleum Corp., 165 F.R.D. 463, 469-71 (W.D.La. 1995).

The District Court in this case simply ignored these problems. It ordered that in Stage I, the jury is to decide claims relating to "liability and relief applicable to the class as a whole, including declaratory and injunctive relief, and whether defendant is liable for punitive damages." (Pet. App. at 12a.) "Testimony by individual employees in Stage I would be for illustrative purposes, either to support or to rebut plaintiffs' class-wide contentions," the Court noted. (Pet. App. at 7a.) If liability is established, the parties will proceed to Stage II, where "appropriate individual compensatory and equitable relief" will be determined. (Pet. App. at 12a). In so ordering, the District Court failed to recognize that, to determine liability in the first instance, the court will have to look beyond "common issues" and assess the facts and circumstances of thousands of individual decisions.

2. *Claims of Intentional Employment Discrimination, Particularly When Coupled With Demands for Compensatory and/or Punitive Damages, Inevitably Raise Interrelated and Overlapping Issues That Cannot Be Separated for Consideration by Different Juries*

A further problem with the bifurcation procedures in this case is that, in the context of intentional employment discrimination cases, the relevant facts do not divide neatly between those pertaining to liability and those pertaining to damages. Indeed, many facts are relevant to both issues.

For example, in Stage I, facts concerning general bias as well as individual discrimination will be offered in order to establish liability. Similarly, facts

constituting general and specific defenses will be offered to rebut such allegations. Some of these facts —both the claims and defenses—undoubtedly will be raised again in Stage II proceedings, as individuals seek to prove they have suffered from discrimination and are entitled to relief.

In addition, in the case at bar, the District Court has ruled that punitive damages will be resolved in Stage I. Whether and in what amount punitive damages are appropriate, however, depends in significant part on the actions directed toward individuals and the harm suffered thereby. As this Court recently held in *BMW of North America v. Gore*, 116 S. Ct. 1589, 1598-99 (1996), the reasonableness of a punitive damages award depends, in significant part, on the degree of reprehensibility of the defendant's conduct and the harm suffered because of it. Lower courts have found the *BMW* guidelines instructive in assessing the propriety of damage awards under Title VII. *See, e.g., Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996). Again, there is no way to resolve this issue in Stage I without going into at least some of the factual issues supposedly reserved for Stage II.

As these examples reflect, bifurcated litigation of intentional employment discrimination claims inevitably will require review of the same facts by at least two different juries. As discussed below, such a result is unconstitutional.

3. *Submission of Interrelated and Overlapping Issues to Separate Juries in Bifurcated Class Action Proceedings Deprives Employers of Fundamental Rights Under the Seventh Amendment*

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII. This Court has interpreted the Seventh Amendment to protect parties from having more than one jury try the facts of their cases, except where the issues are so distinct and independent that no injustice would result. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931). *See also Castano v. American Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 U.S. 184 (1995).

As discussed in the previous section, intentional employment discrimination cases, particularly where damages are sought, are imbued with interrelated and overlapping issues not amenable to division. Accordingly, where such cases are bifurcated, more than one jury inevitably ends up reviewing the same facts. Such a result deprives employers of their constitutional rights.

B. The Improper Use of Class Action Procedures Places Employers Under Enormous Pressure to Settle Cases Without Regard to Their Merits or Lack Thereof

Although Congress limited the damages recoverable under the Civil Rights Act of 1991 to $300,000 per complaining party, plaintiffs' lawyers have discovered a way to magnify greatly the awards that can be obtained through a single lawsuit. By bringing huge class actions, they have been able to create lawsuits with potential value in the billions of dollars.

In the case at bar, Home Depot estimates that there are currently more than 217,000 potential class members. Each member of the class who can demonstrate she was a victim of intentional discrimination may be awarded up to $300,000 in compensatory and punitive damages alone. Theoretically, then, Home Depot's potential liability for damages alone is $65.1 billion (217,000 x $300,000). This does not include potential back pay awards, to which each class member, conceivably, would be entitled. Nor does it take into account Home Depot's litigation costs, which undoubtedly would be immense.

Once plaintiffs obtain class certification in a lawsuit of this type, the defendant's exposure is so enormous as to place almost irresistible pressure on the defendant to settle, regardless of the merits of the claims.[4] Even if the odds of individuals prevail-

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[4] In addition, the district court's decision will encourage frivolous claims. Indeed, the importance of having a meritorious claim in the first place is significantly diminished under the district court's reasoning. The merit of a particu- Title VII claim depends on the conduct of both the defendant and the individual plaintiff. An individual's qualifications, job performance and conduct are inexorably intertwined with the liability determination. The first jury cannot possibly

ing in their intentional discrimination cases are low, defendant's exposure remains absurdly high.

For example, in this case, even if each plaintiff class member had only a one in five chance of prevailing and won only a $30,000 award, defendant's exposure still would be more than a billion dollars (217,000 x 1/5 x $30,000 = $1,302,000,000). Again, this would not include attorney and expert fees and other litigation costs. Indeed, the fees and costs alone relating to the preparation of 217,000 individual defense would be virtually prohibitive. And, defendant would have to pay these costs, even if it prevailed on *every claim* in the second stage of the litigation.

In the face of these numbers, companies have little choice but to cut their losses through settlement. Judge Posner discussed this phenomenon at some length in his decision in *In re Rhone-Poulenc Rorer Inc.* When companies are looking at billions of dollars in potential liability and with it bankruptcy, he observed, "[t]hey may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." 51 F.3d at 1298-99. *See also Castano v. American Tobacco Co.*, 84 F.3d at 747.

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make these determinations properly, especially in this case where the class could number over 200,000. Nonetheless, all claimants, no matter how frivolous their individual claims, will proceed to the second stage if some claimants are found to have been discriminated against in the first. At the second stage, the employer has effectively been assigned the burden of disproving each individual meritless claim in front of a jury that has already been told that the employer discriminates. This *de facto* shifting of the burden of proof is inconsistent with *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)—which holds that the burden of proving discrimination always remains with the plaintiff—and undoubtedly will lead to countless frivolous claims.

Aside from being inherently unfair and unconstitutional, this result accomplishes little in terms of identifying or remedying actual instances of employment discrimination. For once a class is certified, setting up the prospect of huge litigation expenses and creating the risk of a billion dollar judgment, cases are likely to settle before the merits of the claims of discrimination are even explored. In the end, nobody knows whether the employer discriminated or not—only that it paid a lot of money to get out of a no-win situation in which it never should have been placed.

CONCLUSION

For the foregoing reasons, the *amicus curiae*, EEAC respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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